Corn Products Co. (India) Ltd. and another Vs Union of India and another

Court: Bombay High Court

Date of Decision: Feb. 21, 1984

Acts Referred: Central Excises and Salt Act, 1944 â€" Section 11A, 35, 35A, 35A(1), 35A(2)

Citation: (1984) 3 ECC 240 : (1984) 16 ELT 177

Hon'ble Judges: M.N. Chandurkar, C.J; R.A. Jahagirdar, J

Bench: Division Bench

Judgement

Chandurkar, C.J.
Petitioner No. 1 is a Company registered under the provisions of the Companies Act, 1956, and carries on business

manufacturing food-stuffs. The second petitioner is a share holder of the company. The squashes and syrups manufactured by the company in its

factory are first bottled in glass bottles, but for the purposes of easy handling and transport, the squash and syrup bottles are placed in corrugated

boxes which admittedly serve as secondary packing. These corrugated boxes are not manufactured by the petitioner company but purchased from

the open market. According to the company, these corrugated boxes are returnable to the company by the wholesalers and an account of the

returned corrugated boxes is maintained by the company. The boxes are of a durable nature, according to the company, inasmuch as once they are

returned by the wholesalers, they are used again for the purposes of secondary packing of the consignments of squashes and syrups.

2. The Assistant Collector of Central Excise by a letter dated 11th April, 1978 informed the company that he could not consider the corrugated

boxes as durable and he was, therefore, inclined to include the cost of such packages in the value of the product. The company then filed appeal

against this decision. The Appellate Collector of Central Excise by his order dated 30th August, 1979 hold that the product manufactured by the

company is first packed in bottles, which alone can be considered as unit packing u/s 4(4)(d)(i) of the Central Excises and Salt Act (hereinafter

referred to as the ""Excise Act"") and that the secondary packing of the corrugated board boxes would not be covered under the definition of

packing material u/s 4(4)(d)(i) of the Excise Act. Therefore, according to the Appellate Collector, the question of including the cost of such

packing material in the assessable value did not arise.

3. Almost about a year after this order, a show cause notice u/s 36(2) of the Excise Act was issued by the Joint Secretary to the Government of

India on 16th August, 1980 to the company informing the company that the Government of India proposed that in exercise of the powers vested in

the Government of India u/s 36(2), the Government of India proposed to set aside the order of the Appellate Collector or to pass such order as

deemed fit after consideration of the submission of the assessee. According to the Government of India, the corrugated boxes in which the bottled

products are packed would constitute initial packing or the container and that such cardboard boxes were not durable containers as commercially

understood. In reply to the show cause notice, the company filed a statement that in the case of their product, the bottle was the unit container as

well as the initial packing and that the corrugated cardboard boxes would not be considered as initial packing.

4. By its order dated 10th September, 1981 the Government of India took the view that the corrugated box would constitute primary packing and

not secondary packing and, therefore, the value thereof had to be included in the value of the assessable goods. The Government of India

accepted the case of the company that empty cartons were returned to the company. Credit notes to show that the company gave credit to some

of the customers in and around Bombay for the empty cartons were produced before the Government of India. However, according to the

Government of India, merely because the boxes were returned by some buyers located near the factory, that did not lead to the inference that the

cardboard boxes would constitute durable and returnable packing when they were not so understood in commercial parlance due to their semi-

perishable nature and the fact of return of such bulky packing of this nature would not as a rule be economical. The Government of India further

took the view that in a very small percentage of cases, the containers were returned and used again and that the majority portion of the returned

containers was used for the movement of loose bottles. Therefore, according to the Government, the corrugated boxes could not be consider as

durable and returnable packing. Further, the Government took the view that since the goods are by and large sold in packed condition, that is, with

the corrugated containers, the value of the containers could not be excluded from the assessable value of the excisable goods in question and that

the material fact of the goods being marketed in packed condition will not be altered by the credit note given for return of corrugated boxes in

some cases. This view of the Government of India is challenged in this petition by the Petitioner-company.

5. At the threshold it is contended by Mr. Shroff appearing on behalf of the company that the proceedings for suo motu revision of the order of the

Collector of Customs are hit by the provision with regard to limitation in the third proviso to section 36(2) of the Excise Act. According to the

learned Counsel, in a case of short-levy or non-levy of the duty of excise, the notice to show cause could be issued only within a period of six

months from the date of the order of the Collector of Customs.

6. Mr. Sethna and Mr. Deodhar appearing on behalf of the Department have contended that the instant case is governed by the second proviso to

section 36(2) which prescribes a limitation of one year for commencing the proceedings in the exercise of revisional jurisdiction and since the notice

to show cause issued on 16th September, 1980 is within one year of 30th August, 1979, which is the date of the order of the Collector of

Customs, the proceedings were perfectly valid and were not hit by the bar of limitation.

7. This contention necessitates a reference to the relevant provisions of sections 35, 35A and 36 of the Excise Act. Section 35 provides for an

appeal to be filed by a person aggrieved by any decision or order passed by Central Excise Officer under the act or rules made thereunder, not

being an order passed u/s 35A, within three months from the date of the decision or order appealed against. The appeal u/s 35, as it then was, lies

to the Central Board of Excise & Customs or, in such cases as the Central Government directs, to any Central Excise Officer not inferior in rank to

an Assistant Collector of Central Excise and empowered in that behalf by the Central Government. In the exercise of such ordinary jurisdiction, the

appellate authority is empowered to make such further inquiry and pass such order as it thinks fit, confirming, altering or annulling the decision or

order appealed against. However, the order in appeal cannot have the effect of subjecting any person to any greater confiscation or penalty than

has been adjudged against him in the original decision or order. Under sub-section (2) of section 35, an order in appeal made u/s 35 is made

subject to revision u/s 36.

8. Sub-section (1) of Section 35A vests revisional jurisdiction in the Central Board of Excise & Customs and the Collector. This revisional

jurisdiction can be exercised suo motu or otherwise and entitles the Board and the Collector to call for and examine the record of any proceedings

in which any decision or order passed under the act or the rules made thereunder by a Collector of Central Excise for the purpose of satisfying

itself as to the correctness, legality or propriety of the decision or order and to pass such order thereon as it thinks fit. Sub-section (2) of section

35A similarly vests the jurisdiction in the Collector of Central Excise in respect of decisions or orders by a Central Excise Officer subordinate to

him, not being a decision or order passed on appeal u/s 35. It is necessary to reproduce sub-sections (3) and (4) of section 35A which are

worded similar to the second and third proviso to section 36(2) to which we shall refer latter. They run as follows :-

35A(3)(a). No decision or order under this section shall be varied so as to prejudicially affect any person unless such person is given a reasonable

opportunity of making a representation and, if he so desires, of being heard in his defence.

(b) Where the Board or, as the case may be, the Collector of Central Excise is of opinion that any duty of excise has not been levied or has been

short-levied or erroneously refunded, no order levying or enhancing the duty, or no order requiring payment of the duty so refunded, shall be made

under this section unless the person affected by the proposed order is given notice to show cause against it within the time-limit specified in section

11A.

(4) No proceedings shall be commenced under this section in respect of any decision or order [whether such decision or order has been passed

before or after the commencement of the Customs, Central Excises and Salt and Central Boards of Revenue (Amendment) Act, 1978] after the

expiration of a period of one year from the date of such decision or order.

Clause (b) of sub-section (3) and sub-section (4) of section 35A by their plain terms provide for a restriction on the exercise of the revisional

power in certain cases. The three kinds of cases referred to in clause (b) of sub-section (3) are

(1) where any duty of excise has not been levied,

(2) where any duty of excise has been short-levied,

(3) where any duty of excise has been erroneously refunded.

In these three kinds of cases the statute provides that unless a notice to show cause is given within the time-limit prescribed in section 11A, which

admittedly is of six months, an order levying or enhancing penalty or requiring the payment of duty refunded, cannot be made. Sub-section (4)

further refers to the fact that the proceedings u/s 35A cannot be commenced after the expiration of the period of one year from the date of the

decision or order, as the case may be.

9. When we go to section 36 we find a similar scheme therein. While section 35A provided for the revisional jurisdiction of the Central Board or

the Collector, as the case may be, u/s 36 the revisional power was vested in the Central Government. But the power could be exercised in respect

of the order passed u/s 35 or 35A of the Act for the purposes of satisfying itself as to the correctness, legality or propriety of such decision or

order. The revisional power can be exercised in respect of a decision or order passed by any Central Excise Officer or by the Central Board of

Excise and Customs. Sub-section (2) along with three provisos reads as follows :-

36. ""(2) The Central Government may, of its own motion or otherwise, call for and examine the record of any proceeding in which any decision or

order has been passed u/s 35 or section 35A of this Act for the purpose of satisfying itself as to the correctness, legality or propriety of such

decision or order and may pass such order thereon as it thinks fit :

Provided that no decision or order shall be varied so as to prejudicially affect any person unless such person is given a reasonable opportunity of

making a representation and, if he so desires, of being heard in his defence :

Provided further that no proceedings shall be commenced under this sub-section in respect of any decision or order (whether such decision or

order has been passed before or after the coming into force of this sub-section) after the expiration of a period of one year from the date of such

decision or order :

Provided also that where the Central Government is of opinion that any duty of excise has not been levied or has been short-levied or erroneously

refunded, no order levying or enhancing the duty, or no order requiring payment of the duty so refunded, shall be made under this section unless

the person affected by the proposed order is given notice to show cause against it within the time-limit specified in section 11A.

10. As already pointed out, the second proviso to section 36(2) is similar to section 35A(4) and the third proviso to section 36(2) is analogous to

clause (b) of section 35A(3).

11. How, the contention of Mr. Shroff is that in the present case what is sought to be done is that duty is being enhanced on the ground that there

is a short-levy or there is a non-levy and, therefore, this case is governed by the third proviso to section 36(2). According to the learned Counsel,

admittedly the notice to show cause is not within the period of six months from the date of the order and, therefore, the entire proceedings are

vitiated.

12. According to Mr. Sethna and Mr. Deodhar, the third proviso is not attracted to a case where the order sought to be revised is one made u/s

35 by the Collector of Customs and the third proviso to section 36(2) provides for cases which do not fall within the scope of section 35 or 35A.

It is, therefore, contended that since the order sought to be revised was the appellate order of the Collector of Customs, the proceedings will

squarely fall within the second proviso to section 36(2) and since the proceedings have been commenced within the period of one year as required

by the second proviso, there is no infirmity in the proceedings.

13. Now, we have already pointed out that the third proviso to section 36(2) is worded similar to clause (b) of section 36A(3). The normal

purpose of a proviso is to carve out something from the main provision in the section. Unless it is absolutely essential, a proviso cannot be

construed to be an independent provision and while construing a proviso, one must normally proceed on the assumption that by enacting the

proviso, the legislature was making a provision with a view to carve out something which would otherwise have been included in the main and

substantive provision. (See Sales Tax Officer, Circle-I, Jabalpur Vs. Hanuman Prasad, Now, admittedly various kinds of orders could be passed

by the Excise Officers under the Act. The Excise Officers have powers of adjudication. They have powers to make orders of confiscation, they

have powers to levy penalty, they have powers to require payment of fine in lieu of confiscation apart from the powers to decide whether their has

been a case of non-levy or short-levy or whether a refund has been rightly granted or not to the assessee. We need not catalogue here the various

kinds of orders which the Excise Officers can pass. These orders can be the subject-matter of either appeals u/s 35 or be the subject of revisional

jurisdiction u/s 35A by the Board or the Collector, as the case may be. The jurisdiction of the Central Government u/s 36 is a further supervisory

and revisional jurisdiction over the orders which are made u/s 35 or u/s 35A. Some of the matters which are specifically dealt with in clause (b) of

section 35A(3) are also matters relating to non-levy, short-levy or erroneous refunds. It cannot be disputed that when a special provision was

made in clause (b) of section 35A(3) that the Board or the Collector of Central Excise, as the case may be, would not be entitled to revise the

orders of the subordinate officers in respect of these three categories of cases unless a notice to show cause was given within the time-limits

prescribed in section 11A, that is, within the period of six months from the date of the order sought to be revised, it is obvious that the rule of

limitation was sought to be laid down by the legislature, which would be applicable only to a limited class of cases referred to in clause (b) of

section 35A(3). By making a similar provision in the third proviso to section 36(2) it is obvious that the legislature wanted even Central

Government''s revisional jurisdiction to be controlled by the provision with regard to limitation in respect of the matters relating to non-levy, short-

levy or erroneous refunds arising out of orders which are made u/s 35 or 35A of the Excise Act. If we accept the contention advanced before us

on behalf of the Department, the effect would be that there would be two parallel jurisdictions of a revisional nature in respect of the same orders

and possibly the only orders which could be subject to such revisional jurisdiction would be the orders of the Assistant Collector which would

suffer from the defect of non-levy, short-levy or erroneous refund. In case the Assistant Collector makes such orders, there was no question of the

assessee going in appeal against those parts of the orders and the decision on the construction sought to be placed by the Department would be

that either the Board or the Collector or the Central Government could issue notice to show cause against such orders. Vesting of parallel

jurisdiction in respect of the same subject-matter could not have been intended by the legislature at all. We must, therefore, construe the third

proviso to section 36(8) on the same lines as clause (b) of sub-section (3) of section 35A. If that is the way we must construe the third proviso to

section 36(2), it must be held that the third proviso has the effect of restricting the revisional jurisdiction of the Central Government in matters which

arise out of the orders under sections 35 and 35A relating to non-levy, short-levy or erroneous refund. This restriction is in the form of an express

provision that the notice to show cause in respect of these matters must be given within the time-limit specified to section 11A, that is, within the

period of six months.

14. On this construction it is obvious that the notice to show cause issued by the Central Government is beyond the period of six months and

consequently, the exercise of revisional jurisdiction by the Central Government would be wholly without jurisdiction.

15. Though this is sufficient to dispose of the petition and on this ground alone, the order of the Central Government is liable to be quashed, it

appears to us that in any case, the petitioners are bound to succeed even on merits. We have taken the view in Writ Petition No. 1384 of 1983,

Messrs Sathe Biscuits and Chocolate Company Limited and another v. The Union of India and others, [Being reported in E.L.T., June, 1984.]

decided on 20th February, 1984, that any packing which is of a durable nature and is returnable by the buyer to the assessee under the terms of

the sale has to be excluded from the value for the purposes of excise duty. The facts in the instant case clearly show that so far as the company is

concerned, the price of the corrugated boxes was first debited along with the invoice for the product and on being returned, the account of the

wholesalers has been credited with the price of the secondary packing. The case of the company that these boxes can be reused has been

accepted even by the Central Government. But what the Central Government says is that merely because in some cases the empty cartons have

been returned, it would not lead to the inference that the cardboard boxes could constitute durable and returnable packing. We fail to appreciate

this view. Once it is found that a packing has been returned and is capable of being reused, the term of suitability has in terms been satisfied. On

facts the return ability of a carton is the term of the sale and, therefore, having regard to the very definition of "value" in section 4(4)(d), the cost of

the price of the corrugated carton was liable to be excluded. It, therefore, appears to us that the Appellate Collector of Central Excise had taken

the correct view of the matter and there was no infirmity in the view taken by him, with the result that even on merits, the order of the Central

Government cannot be sustained.

16. Looking at it from any point of view, therefore, this petition will have to be allowed and petitioner No. 1 company will be entitled to an order

quashing the order of the Government of India dated 10th September, 1981 (Exhibit K) as well as quashing the notice of demand dated 14th

December, 1981 (Exhibit L). The petitioners are entitled to a refund of the amounts recovered from petitioner No. 1 company on the footing that

the company was liable to pay excise duty on the value of the corrugated cartons also. The petitioners to get the costs of this petition.